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Contributions of the Chambers of the International Tribunal for the Former Yugoslavia on the Provisional rules of procedure and evidence for the Court, submitted to the Preparatory Commission at its 13-31 March 2000 session

Information paper submitted by the delegations of Bosnia and Herzegovina, Canada, Colombia, Egypt, Portugal and Spain concerning Part 10 of the Rome Statute: Enforcement

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I. Introduction and note on expedition of proceedings[1]

1. In July 1999, the judges of the International Tribunal for the Former Yugoslavia submitted a report to the Preparatory Commission regarding the Rules of Procedure and Evidence of the International Criminal Court (ICC). The report focused, *inter alia*, on the role of judges in the rule-making process, trial management issues, and evidentiary rules. The report was presented by Judge Gabrielle Kirk McDonald, who was then President of the Tribunal, to the Preparatory Commission on 30 July 1999.

2. The Preparatory Commission has now drafted provisional Rules of Procedure and Evidence[1] ("Provisional Rules"). The judges, acting on suggestions that the Tribunal's experience might be useful to the Preparatory Commission in its consideration of the Provisional Rules, have prepared some additional information and comments regarding certain matters that are in dispute in the Provisional Rules or that have not been addressed therein. The intention is simply to share the Tribunal's experience and practice in a few key areas that were not covered in the Judges' previous report. The areas that have been selected for comment are limited and primarily concern aspects of the Tribunal's jurisprudence and practice that may be of particular benefit to the Preparatory Commission.

3. The topics that have been chosen for comment include sexual violence, particularly rules regulating the admission of evidence of consent and prior sexual conduct; the Victims and Witnesses Unit; defence counsel; and enforcement of sentences. In addition, the judges would also reiterate the central theme of their July 1999 report: the ICC's Rules of Procedure and Evidence must provide the Court's judges with the tools to expedite proceedings. The Tribunal has grappled with the issue of providing expeditious trials to accused individuals and has taken a number of steps to quicken its proceedings. In this regard, the judges would draw the attention of the Preparatory Commission to their July report and would also note the recent Expert Group Report,[2] which contains a number of additional proposals that are currently under review by all of the organs of both ad hoc Tribunals. The judges have found that every aspect of the process must be carefully examined to ensure that the proceedings are carried out fairly and efficiently and that time is not wasted. While there is no doubt that proceedings in the International Criminal Court, as in the International Tribunal, will be complex and difficult, it is imperative that justice be accomplished in an efficient manner as possible. Thus, in addition to the following comments, which are provided in a spirit of cooperation, the judges would reiterate the lessons and comments set forth in their previous report of July 1999.

II. Enforcement of sentences

4. The ICC Statute and Provisional Rules already provide extensive provisions concerning the enforcement of sentences. However, in the International Tribunal's seven years of practical experience, even with affirmative commitments of State cooperation, agreements with States to enforce sentences have been difficult to

[1] The present document should be read in conjunction with documents PCNICC/2000/WGRPE(4)/INF.1 and PCNICC/2000/WGRPE(6)/INF.1.

[2] Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, see United Nations document A/54/634.

conclude; without substantial and extensive State cooperation, the Tribunal does not have the power to enforce its mandate, including its sentences. On this topic the judges merely wish to indicate areas of particular difficulty in effecting these Rules, and to advise delegates of certain experiences, such as Practice Directions, principles of which the Preparatory Commission may wish to consider in devising appropriate rules for the ICC.

5. To date, the International Tribunal has handed down judgements against 16 accused,[3] including two final judgements.[4] Tribunal appeals are pending in five cases against 12 accused. Another 22 accused in custody are in various stages of trial or pre-trial proceedings. However, despite extensive efforts, since 1993 the Tribunal has secured only six enforcement agreements with States, many of which attach conditions or restrictions to these agreements. Thus far, only Italy, Finland, Norway, Sweden, Austria and France have signed agreements for enforcing the sentences of persons convicted by the Tribunal. There are many reasons why the Tribunal has encountered difficulties in reaching agreements with States for enforcing the sentences rendered by the Tribunal, and many of these same difficulties — such as security issues, inadequate domestic implementing legislation, insufficient prison facilities or standards, and financial concerns — will similarly be faced by the ICC.

A. Constraints on the Tribunal

6. The report of the Secretary-General establishing the Tribunal asserts that "the enforcement of sentences should take place outside the territory of the former Yugoslavia. States should be encouraged to declare their readiness to carry out the enforcement of prison sentences in accordance with their domestic laws and procedures, under the supervision of the International Tribunal. The Security Council would make appropriate arrangements to obtain from States an indication of their willingness to accept convicted persons. This information would be communicated to the Registrar, who would prepare a list of States in which the enforcement of sentences would be carried out.[5] In conjunction with this, article 27 of the Statute of the Tribunal provides: "Imprisonment shall be served in a State designated by the International Tribunal from a list of States which have indicated to the Security Council their willingness to accept convicted persons. Such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal."[6] Thus, States are merely to indicate their "willingness" to assist the Tribunal, and the Tribunal is to "supervise" the imprisonment. Similarly the ICC

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[3] See Prosecutor v. Duško Tadić a/k/a "Dule", Opinion and Judgment, IT-94-1-T, 7 May 1997; Prosecutor v. Dražen Erdemović, Judgement, IT-96-22-A, 7 October 1997; Prosecutor v. Zejnil Delalić and 3 others, "Čelebići", Judgement, IT-96-21-T, 16 November 1998; Prosecutor v. Anto Furundžija, Judgement, IT-95-17/1-T, 10 December 1998; Prosecutor v. Zlatko Aleksovski, Judgement, IT-95-14/1-T, 25 June 1999; Prosecutor v. Goran Jelisić, Judgement, IT-95-10-T, 19 October 1999; Prosecutor v. Zoran Kupreškić and 5 others, Judgement, IT-95-16-T, 14 January 2000; Prosecutor v. Tihomir Blaškić, Judgement IT-94-14-T, 3 March 2000.

[4] Prosecutor v. Dražen Erdemović, Sentencing Judgement, IT-96-22-T*bis*, 5 March 1998; Prosecutor v. Duško Tadić, Judgement, App. Ch., IT-94-1-A, 15 July 1999.

[5] S/25704, paras. 121-122.

[6] Article 26 of the Statute of the Rwanda Tribunal provides a similar provision, but allows the sentence to be served in Rwanda as well. Rule 103, Place of imprisonment, states:
"(A) Imprisonment shall be served in Rwanda or any State designated by the Tribunal from a list of States which have indicated their willingness to accept convicted persons for the serving of sentences. Prior to a decision on the place of imprisonment, the Chamber shall notify the Government of Rwanda.
"(B) Transfer of the convicted person to that State shall be effected as soon as possible after the time limit for appeal has elapsed."

Statute provides for States to indicate their "willingness" to enforce sentences[7] and the Court is to "supervise" the enforcement of sentences and conditions of imprisonment.[8] To provide additional procedures in this regard, Tribunal rule 103 establishes certain procedures to be followed concerning the place of imprisonment.

7. The ad hoc Tribunals, as subsidiary organs of the Security Council, have limited jurisdiction, with little effective enforcement powers. Regarding State cooperation, even though article 29 of the Statute of the Tribunal affirms that States Members of the United Nations must "comply without undue delay with any request for assistance", this obligation refers to assistance in regard to prosecution, arrest and the like, not enforcement of sentences. The Tribunals have no permanent detention facilities and must rely upon States to carry out its sentences. The ICC, as a treaty-based organization, will also be dependent on voluntary State cooperation to enforce its sentences, including accepting a person convicted by the Court and enforcing the sentences handed down, as its Statute did not create a legal obligation on States parties to enforce sentences rendered by the Court. It does, however, include a provision that if no State is designated to enforce a sentence handed down by the Court, "the sentence of imprisonment shall be served in a prison facility made available by the host State, in accordance with the conditions set out in the headquarters agreement".[9] While this provision does provide a safety valve not available to the Tribunal, it should not provide an excuse for other States to fail in their responsibility to the Court, as this would go against the spirit of equitable burden sharing and State cooperation foreseen by the ICC Statute.

B. Practice of the Tribunal in enforcing sentences

8. The Tribunal has adopted a Practice Direction that establishes the procedures for designating a State in which the convicted person is to serve his/her sentence of imprisonment.[10] Essentially, the Registrar sends an inquiry to States that have signed enforcement agreements as to whether that State is willing to enforce a particular sentence. Based on this and other relevant information,[11] the President determines in which State the sentence should be served, and whether this information should be public or private. This information is then transmitted to the Registrar who, in accordance with the enforcement agreement of the designated State, requests that State to enforce the sentence of the convicted person. The Government of the requested State then notifies the Tribunal of its acceptance or rejection of the request to enforce the sentence, and if accepted, the relevant provisions of the enforcement agreement will be followed; if rejected, the Registrar refers the issue back to the President to designate another State.

[7] ICC Statute, art. 103, para. 1(a).
[8] Ibid., art. 106.
[9] Ibid., art. 103, para. 4
[10] IT/137, 9 July 1998.
[11] Information include, but is not limited to, such considerations as the convicted person's family situation, usual place of residence and proximity to the States under consideration, and financial resources available to facilitate familial visits; whether the convicted person is expected to serve as a witness in future Tribunal proceedings; whether the convicted person is expected to be relocated as a witness and, if so, which States have entered into relocation agreements with the Tribunal; any appropriate medical or psychological reports; linguistic skills; general prison conditions and rules governing security and liberty in the willing States; and any other information deemed pertinent, such as the preference of the convicted person and/or the Prosecutor.

9. The provisions of the Statute and the Rules only address the principles relevant to the enforcement of sentences; they do not address the modalities of enforcing sentences. Moreover, although a number of States have included provisions on the enforcement of sentences in their implementing legislation, such legislation can be changed or altered. Given this, the Registry in coordination with the United Nations Office of Legal Affairs developed a Model Agreement on the enforcement of sentences, which addresses the modalities of enforcement and establishes the framework in which the sentences should be carried out. (The Model Agreement builds on the provisions of the Statute, but it also contains important clarifications of the relationship between the Tribunal and the State.) The agreements concluded are framework agreements, according to which each request is dealt with on an ad hoc basis, i.e., under the agreement a requested State can reject a request from the Tribunal to enforce a sentence.

C. Principles of the Tribunal regarding pardon, commutation of sentence or early release

10. States differ widely in their domestic laws, policies and practices pertaining to pardon, commutation of sentence and early release, and also have differing internal mechanisms to be followed in executing those regulations. Article 28, on pardon or commutation of sentences, of the Statute of the Tribunal provides:

> "If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the International Tribunal accordingly. The President of the International Tribunal, in consultation with the judges, shall decide the matter on the basis of interests of justice and the general principles of law."

11. To effectuate this provision, the Tribunal adopted several rules and directions to guide its determination of early release considerations. Rules 123 and 124 provide that if the law of the State of imprisonment allows for pardon or commutation, once the convicted person becomes eligible, the State notifies the Tribunal of that eligibility. Upon receiving such notice, the President of the Tribunal, in consultation with the judges, makes a determination as to whether pardon or commutation is appropriate. In making this decision, rule 125 provides general standards to be considered, such as the gravity of the crime committed, the treatment of similarly situated prisoners, the prisoner's demonstration of rehabilitation and any substantial cooperation with the Office of the Prosecutor. The Statute and the Rules are silent on early release.

D. Model Agreements and Practice Directions

12. Because the Constitution or other such authority of many States vests power to commute sentences, pardon, etc., in the State's president, queen, or other such authority, and because the Statute vests such authority in the Tribunal (and its Rules designate the President as the authorizing entity), in the enforcement agreements, the Registrar has had to devise creative ways to allow both authorities to be respected without having their powers superseded. Thus, a typical solution is article 9 of the Enforcement Agreement between Italy and the Tribunal, which provides that enforcement of the sentence shall cease when the sentence is completed, at the death or upon the pardon of the convicted, or following a decision of the Tribunal, which may "at any time decide to request the termination of the enforcement in the requested State and transfer the convicted person to another State or to the International Tribunal".[12] Thus, essentially, if the enforcing State is in disagreement with the Tribunal as to early release or pardon, to prevent a conflict between the State and the Tribunal, the Tribunal may simply request that the enforcing State transfer the convicted person either to another State or back to the International Tribunal. Such a provision upholds both the primacy of the Tribunal in that the President of the Tribunal will grant any pardon, commutation or early release while at the same time the authority vested in the executive of the enforcing State to grant the same measures is not violated. This solution will enable the State and the Tribunal to conclude an agreement acceptable to both parties.

13. It is important to emphasize that enforcement agreements will not be possible to negotiate unless appropriate implementing legislation has been adopted. For example, a number of States have been unable to sign agreements enforcing sentences with the Tribunal until their domestic law has been changed or because their implementing legislation for cooperation with the Tribunal contained language incompatible with such an enforcement agreement. Hopefully, by taking enforcement agreements into account when enacting implementing legislation, this situation can be avoided with the ICC.

14. When the Model Agreement and Practice Directions were developed, it was considered appropriate that early release be dealt with in the same manner as pardon and commutation. Thus, both the Model Agreement and the Practice Direction provide that once a convicted person becomes eligible for early release, the matter should be referred to the President of the Tribunal for decision. One problem that has arisen is that some States have maximum sentence provisions that may make long-term sentences difficult to enforce in these countries.

15. A Practice Direction on applications for pardon, commutation and early release was issued by the President of the Tribunal to regulate the internal procedures to be followed.[13] When a person serving his/her sentence becomes eligible for such considerations, the direction establishes procedures for notifying the convicted person of his/her eligibility, means of allowing participation of the convicted person, and establishing a consultation process with other appropriate parties, such as the enforcing State, the Office of the Prosecutor and the sentencing Chamber. After taking into account all relevant information, the President renders a decision. If

[12] Agreement between the Government of the Italian Republic and the United Nations on the Enforcement of Sentences of the International Criminal Tribunal for the Former Yugoslavia, 6 February 1997.

[13] IT/146, 7 April 1999.

early release is deemed inappropriate, the decision then specifies the next date of eligibility for consideration of early release unless such date is already specified by the domestic law of the enforcing State. The Registrar transmits the decision to the relevant authorities charged with executing the terms of the decision, as well as to the convicted persons and other appropriate parties. The Practice Direction also allows, in certain circumstances, for other persons to be informed of the decision. For example, persons who testified before the Tribunal may, at the direction of the President, be informed by the Registry that a convicted person has been granted early release, the destination he or she will travel to upon release, and other such information deemed relevant.

E. Experience of the Tribunal as practical guidance for the proposed ICC Rules

16. The ICC Statute has already provided detailed measures to be taken regarding the role of States in enforcing the sentences handed down by the Court, including incorporating detailed procedures directly into the Statute, many of which reflect rules and practices of the Tribunal.

17. In the ICC Statute, article 103, "Role of States in enforcement of sentences of imprisonment", provides extensive procedures to be followed. Articles 104 to 110 of the ICC Statute concern the role of the Court in enforcing the sentences and provide an elaborate scheme of rules to assist the Court in implementing the enforcement, such as provisions of transfer, and conditions of imprisonment. All statutory provisions refer to "the Court", but the provisional rules allocate these powers to the "Presidency" (comprising the President and the First and Second Vice-Presidents), which is consistent with the Tribunal's practice of allocating this authority to the "President".[14]

18. It is important to note that Tribunal rule 104 provides: "All sentences of imprisonment shall be supervised by the Tribunal *or a body designated by it*".[15] As Judge May noted recently, a formal connection between the Tribunal and the ICC may be appropriate "in relation to the enforcement of the sentences handed down by the Tribunal. The Rules of Procedure and Evidence provide that the President shall determine whether pardon or commutation is appropriate: rule 124. This is clearly a judicial decision and one best made with experience of the relevant crimes and proceedings. When the Tribunal is no longer in being, it may be appropriate for these functions to be taken over by the ICC."[16] Thus, perhaps a formal relationship between the ICC and the ad hoc Tribunals can be developed eventually in regard to the enforcement of sentences handed down by the former Yugoslavia Tribunal, such that these sentences can eventually be supervised by the ICC once the Tribunal completes its mandate.

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[14] Although the reasons for assigning this power to the President instead of the Registrar are complex, they relate to the mixed administrative/judicial character of enforcement of sentences, rendering the Registry less appropriate as the decision maker in this instance. Similarly, there are reasons for not assignment this role to the Sentencing Chamber, especially as this might impart a presumption that such a role would require judicial proceedings.

[15] Emphasis added.

[16] Richard May, "The Relationship between the International Criminal Court and the International Criminal Tribunal for the former Yugoslavia", in *Reflections on the International Criminal Court* 156 (Herman A.M. von Hebel, Johan G. Lammers and Jolien Schukking eds., 1999).

19. The International Tribunal has several years of practical experience applying and interpreting its Rules of Procedure and Evidence governing many of the same crimes and facing many of the same experiences as will challenge the ICC. Indeed, in many instances, the ICC Rules are identical to the Rules of the Tribunal, whereas in other respects, the ICC Rules differ, perhaps to reflect State consensus or preference. It is hoped that the ICC will be able to use and build on the experience of the Tribunal, its jurisprudence, Rules and any other relevant documents, practices or resources as guidance in formulating rules, procedures, elements and practice.